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Supreme Court, U.S.
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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

Donna J. Arensdorf,
Plaintiff –Appellant

v.

Henry M. Paulsen,
Defendant –Appellee

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DONNA J. ARENSDORF,
PRO SE
10915 PRAIRIE HAWK DR.
HOUSTON, TEXAS 77064
CELL 832-860-3544

QUESTIONS PRESENTED FOR REVIEW

Rule 14.1 (a)

1. Did Appellant prove prima facie in sex discrimination?

2. Did Appellant prove prima facie in age discrimination?

3. Did Appellant prove prima facie in sexual harassment?

4. Did Appellant prove prima facie in Hostile Work Environment?

5. Did Appellant prove prima facie in Retaliation?

6. Did Appellant prove Whistleblowing Retaliation?

7. Did Appellant prove prima facie under McDonnell Douglas Test?

8. Should a jury decide the credibility of the Appellant and the Appellee?

9. Was the Internal Revenue Service required to follow the Civil Service Reform Act of 1978 and Title 5, U. S. Code Chapter 43 prerequisites to prepare a performance evaluation that was used to terminate the Appellant?

10. Was the Internal Revenue Service required to use all sub-elements and aspects under the critical element to determine if the Appellant failed one entire critical element?

PARTIES TO PROCEEDING PURSUANT TO RULE 14.1(B). AND AND 29.6

Donna J. Arensdorf is an individual who was an employee of the Internal Revenue Service, Department of the Treasury. The Defendant-Appellee, Henry M. Paulsen was Secretary of the Treasury.

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APPENDIX B
Final Judgment of the United States District Court, Southern District of Texas, Houston Division dated October 2, 2008

APPENDIX C
Memorandum and Order of the United States District Court, Southern District of Texas, Houston Division dated September 29, 2008.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT AND TO THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Appellant, Donna Arensdorf, files this Petition for Writ of Certiorari requesting that this Honorable Court review the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the United States District Court for the Southern District of Texas, Houston Division.

OPINIONS BELOW

A copy of the Judgment of the United States Court of Appeals for the Fifth Circuit affirming the decision of the Unites States District Court for the Southern District of Texas, Houston Division, is attached as Appendix A.

A copy of the Final Judgment of the United States District Court for the Southern District of Texas, Houston Division, is attached as Appendix B.

A copy of the Memorandum and Order of the Unites States District Court for the Southern District of Texas, Houston Division is attached as Appendix C.

STATEMENT OF JURISDICTION

This is a civil appeal from a Decision of a United States District Court and a Federal Circuit Court of Appeals. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

STATUTES INVOLVED

The District Court had jurisdiction over Appellant's claims under 28 U. S. C. 1333. Appeal was properly taken by Appellant to the United States Court of Appeals for the Fifth Circuit pursuant to 28 U. S. C. 1291 and Rule 4 of the Fed. R. App. Proc.

Appellant states the Annual Appraisal used to terminate her after 37 years of federal employment should have been prepared according to the Civil Service Reform Act of 1978 and Title 5, U. S. C. Chapter 43.

SUMMARY OF THE CASE

Appellant Arensdorf asserts that the subjective instead of objective preparation of the annual performance appraisal that lead to her termination was arbitrary and capricious, and was based on retaliation against her by management for her prior EEO activity and whistle blowing. The District Court stated Petitioner's TORT claim was preempted by the Civil Service Reform Act of 1978. The Courts have consistently held that pre-emption occurs only where Congress, explicitly or impliedly, so intends. *Pilot Life Ins. Co. v. Dedeaux,* 481 U. S. 41, 45 (1987) (congressional intent is

the "ultimatc touchstone" for pre-emption). The judiciary's "sole task is to ascertain the intent of Congress." The District Court never addressed Congressional Intent.

Appellant Arensdorf is a Caucasian female who worked for the Department of Treasury, Internal Revenue Service, as a Revenue Officer for twenty years when she was terminated from her position on August 26, 2005 for failing to do alleged timely actions on six taxpayer case files. The agency also stated being the actions were alleged to be untimely that meant she also failed inventory management on six additional cases. The agency stated they made their determination based on an internal document, not the Civil Service Reform Act of 1978 ,or Chapter 43 of the U. S. Code.

Appellant Arensdorf alleged that she suffered the adverse employment action of termination based on age and gender, and suffered retaliation, by the same Internal Revenue Service officials, based on her prior EEO activity and whistle blowing.

Appellant Arensdorf was notified on November 19, 2003, just six weeks before her 55th Birthday on January 5, 2004, that her work was unsatisfactory, and if she did not improve by working faster she would be re-assigned or terminated from her federal position.

Appellant Arensdorf was informed pursuant to group meeting that an under forty employee was given a bonus after that Revenue Officer was alleged to have deficiency in taxpayer case activity.

Appellant Arensdorf alleged that she received disparate treatment when she was terminated for the same alleged offense for which an under forty employee received a bonus.

Appellant Arensdorf received an e-mail from The Office of Personnel Management that stated more females than males were removed from employment in 2005. The Office of Personnel Management also stated that more employees over age 40 had been terminated under Chapter 43 than under age 40 employees.

Appellant Arensdorf asserts that Respondent failed to abide by the National Treasury Employees Union Contract, Civil Service Reform Act of 1978 and Title 5, U. S. Code, Chapter 43 to perform an annual appraisal that was used to terminate the Appellant.

1. On May 8, 2002, Appellant was voluntarily re-assigned to the supervision of James A. Gibson. [USCA 5 84].

2. On or about May 8, 2002, Appellant had a conversation with Mr. Gibson, her first line manager, in which he stated he had no problem with her work, but

she should go faster. The Performance Appraisal signed by Appellant on July 23, 2003, for the period June 2002 thru June 2003, shows Appellant exceeds timely actions. Item 11, Performance Aspects were never addressed on this document. [USCA5 270]. The directions for completion of the appraisal form state that Block 11 should list all the aspects listed under the sub-element. [USCA5 765]

3. On or about May 10, 2002, Appellant asked Mr. Gibson, for additional work, and he screamed at her, "Assign cases to yourself." [USCA5 1942.]

4. On or about February 3, 2003, Appellant was notified by Mr. Gibson, that her work was unsatisfactory. She also received a memo stating that she never answered his pages and never followed his directions. [USCA5 2572]

5. On or about July 1, 2003, Appellant received her with-in-grade step increase. This monetary increase would have been withheld if Appellant's work was unsatisfactory. [USCA5 762].

6. On or about July 31, 2003, Appellant received her annual appraisal for the period June 2002, thru June, 2003, with a rating of 3.0. Item 11, Performance aspects were never addressed on this document. Appellant exceeded timely actions. The

appraisal was signed by Mr. Gibson and Mr. Arnold. [USCA5 84, 280].

7. On or about August 4, 2003, the secretary started making inaccurate entries on Appellant's time record. [USCA5 2573].

8. On or about November 19, 2003, Appellant was notified by Mr. Gibson, that she was failing several critical elements, and if she did not improve, she would be re-assigned, demoted or removed from federal employment. [USCA 5 92].

9. On or about November 19, 2003, Appellant was advised by Mr. Gibson, to discontinue her flexi-place agreement and return to the office for further supervision and assistance. [USCA 5 84, 98, 99].

10. On January 5, 2004, Appellant attained age 55. (Retirement Age). [USCA 5 84].

11. On or about February 1, 2004, in an EEO affidavit, Mr. Gibson, stated he had prior involvement in the EEO process as a complainant, witness and management official. He also stated that he was aware that Appellant previously participated in the EEO process. [USCA5 1932]

12. On or about February 15, 2004, Appellant stated in an EEO interview that in 1991 she had to file a grievance to obtain her GS 11 promotion. [USCA5 1941]

13. On or about February 23, 2004, Appellant received an e-mail from Mr.

Gibson, stating he wanted to meet with her, and if she did not meet with him on the day and time requested, that she would be subject to disciplinary action for failure to follow managerial direction. [USCA5 1916]

14. On or about June 7, 2004, Appellant contacted Mr. Gibson's supervisor, Martin Arnold, and requested to be moved to another manager. The request was denied. [USCA5 112, 141, 182, 262].

15. On or about July 28, 2004, Appellant notified her manager, Mr. Gibson, by e-mail, that she had an appointment with Treasury Inspector General for Tax Administration on August 3, 2004 at 8AM. [USCA5 1967]

16. On or about July 31, 2004, Appellant received her annual appraisal, for the period June 2003, thru June ,2004, with a rating of 2.4. Just a year earlier Appellant received "exceeds" in timely actions, but this time she received fails in timely actions. The appraisal was signed by Mr. Gibson and Mr. Arnold. [USCA 5 85]. Where performance standard contains no explicit timeliness requirement, charge of untimeliness cannot be basis for Chapter 43 action. Appellant's performance standards did not contain a timeliness requirement. [USCA5 540, Line 6].

17. On or about August 18, 2004, Appellant received a memorandum from Mr.

Gibson, stating that after 10 years working from her home, she would have to report back to the office to work, because she was not working in a timely fashion according to her appraisal dated on or about July 31, 2004. [USCA5 82].

18. On or about August 31, 2004, Appellant strained her back lifting taxpayer case files out of her car trunk. Mr. Gibson demanded that she immediately return all of the approximately 70 files to the office. [USCA5 154].

19. On or about August 31, 2004, Appellant filed a report of back injury with the Office of Workmen's Compensation. [USCA 5 154].

20. On or about August 31, 2004, Appellant was placed on medical leave by her physician and therapist due to complications from medical conditions and on-the-job stress. [USCA5 72-75].

21. On or about October 15, 2004, Appellant was notified that her manager; Mr. Gibson, had tried to get her injury claim denied. [USCA5 2600-2601].

22. On or about December 1, 2004, Mr. Gibson, sent certified letters to Appellant stating that if she did not provide additional medical information her approved leave and any future leave would be noted as AWOL. [USCA5 117,145].

23. On or about December 4, 2004, another employee, under the supervision of Mr. Gibson, stated in her EEO Declaration, that in our Survey Feedback Session the group pointed out approximately 30 negative behavioral traits exhibited by Mr. Gibson. Mr. Gibson stated that he was not aware of any of his behavioral traits. She also stated that all but one female Revenue Officer has had difficulty working with Mr. Gibson. Female Revenue Officers are reluctant to approach or talk with Mr. Gibson. [USCA5 2574].

24. On or about December 31, 2004, Appellant received a request from Mr. Gibson, for the diagnosis and prognosis of her medical condition. [USCA5 878].

25. On March 1, 2005, Appellant returned to her position as Revenue Officer under the supervision of Mr. Gibson. [USCA5 87].

26. On or about March 1, 2005, Mr. Gibson, assigned former manager, Sue Burton, as Appellant's on-the-job instructor. [USCA 101].

27. On or about March 1, 2005, Appellant was placed on a Performance Improvement Plan by Mr. Gibson. [USCA 5 87].

28. On or about March 1, 2005, Appellant had her printer and phone card removed. [USCA 5 117]

29. On May 17, 2005, the EEO Oral Deposition of Appellant was conducted. [USCA5 1974-2017].

30. On or about May 18, 2005, Appellant received a memorandum from Mr. Gibson, stating that if she did not get actions done on 17 cases that he wanted done in four days she would be charged with insubordination. [USCA5886]

31. On or about June 7, 2005, Appellant's Performance Improvement Plan ended. [USCA 5 87]. The Performance Improvement Plan consisted of 45 workdays, from March 7, 2005 thru June 9, 2005. During that period, Appellant performed the following tasks: a. Appellant visited 65 taxpayers at their residences or places of business; [Appellant's travel vouchers are proof of the visits conducted during the PIP] b. Appellant reviewed over 400 e-mails received while she was on sick leave; c. Appellant received over 40 e-mails from her manager and her on-the-job instructor during the PIP; d. Appellant attended scheduled group meetings; e. Appellant attended meetings with her manager every two weeks concerning the reviews he conducted during the PIP; f. Appellant prepared rebuttals to reviews; g. Appellant wrote case histories on every taxpayer contact, which normally resulted in several

pages of history; and h. Appellant performed research on all her taxpayer files. [This research is included in the ten volumes submitted by the agency as evidenced in this proceeding.] The research consisted of seven volumes. [USCA5 438]

32. On July 6, 2005, Appellant was instructed by Mr. Gibson, to drive to the office of Martin Arnold, Territory Manager, to receive her Proposed Removal Letter. During this meeting Mr. Arnold stated to Appellant that he never had heard of Title 5, USC Chapter 43. [USCA 5 109].

33. On July 6, 2005, Appellant was advised by Mr. Gibson, and Mr. Arnold, to perform clerical and forms room's duties that required heavy lifting until she was terminated. [USCA5 109, 450].

34. On July 8, 2005, during Appellant's EEO hearing, Mr. Attig, the attorney for the agency, stated that Chapter 43 and Chapter 75 have nothing to do with an appraisal. [USCA5 2345].

35. On or about July 31, 2005, Appellant was given an appraisal for the period July 1, 2004 thru June 30, 2005 with a score of 1.4. Appellant was on sick leave August 31, 2004 thru February 28, 2005. [USCA5 2574]

36. On August 26, 2005, Appellant was terminated from her Revenue Officer Position. [USCA5 109]. The removal letter

signed by Ellen Dolby was dated August 5, 2005 but not given to Appellant until August 24, 2005. The appraisal used for the termination was for the period June 2003 to July 2004. This means cases Appellant received over 2 years prior to her termination were used to terminate her. This is illegal according to the Civil Service Reform Act of 1978.

37. On or about August 27, 2005, Appellant filed a complaint with the Merit System Protection Board concerning her removal. The agency stated the removal was based on Appellant failing two of the three sub-elements, timely actions and inventory management under Critical Element V. The removal was not based on one entire critical element. [USCA5 110, 286].

38. On or about September 1, 2005, Appellant received an SF 52, Personnel Action, stating the legal authority for the removal for her removal was Reg. 432.101 EQ. [USCA5 312]. Appellant never received a SF 50 as required by agency regulations.

39. On January 26, 2006, Merit System Protection Board Administrative Judge, William Carnes, conducted a Pre-hearing Conference Call with Appellant and her attorney. [USCA5 461]. During this Conference Call, Judge Carnes stated, "Why don't you just retire? They do not want you there anymore."

40. On or about February 13, 2006, Judge Carnes stated that the prerequisites of a Chapter 43 action would not be considered in his decision. [USCA5 328].

41. On or about February 13, 2006, at the MSPB hearing, Judge Carnes refused to allow Petitioner to introduce a copy of the Chapter 43 prerequisites into the hearing record. He also refused to accept a copy of the revised aspects dated May, 2002. [USCA5 585].

42. On or about February 13, 2006, Judge Carnes stated that the agency did not have to use the entire critical element to determine Appellant failed in timely actions and inventory management. [USCA5 330-357]. These were the revised aspects dated May, 2002. [USCA5 2615-2616.] Two different sets of tapes of the MSPB Hearings held on February 13, and 14, 2006 exist. Each set is different and gaps exist in the tapes. One set was submitted by the MSPB in Dallas, and the other set of tapes was submitted by the court reporter. Both sets are incomplete with gaps at different parts of the testimony.

43. On or about February 13, or 14, 2006, during the MSPB hearing, the Territory Manager, Mr. Martin Arnold ,admitted that he disagreed with Mr. Gibson's interpretation of Appellant's work, and that he had the ratings changed from

failing critical elements to marginally meeting them. [Hearing Tape 3B, Counter 70-85]. Mr. Arnold stated during the MSPB hearing that he may have terminated one other person besides appellant from her federal position but did not know the gender, age, name or when or where this took place. Mr. Gibson stated Appellant was the first person he terminated from their federal position. Mr. Arnold and Mr. Gibson stated they were unaware of the two legal processes, Chapter 43/75 to remove a federal employee from service.

44. On or about May 26, 2006, Judge Carnes, of the Merit System Protection Board, stated Appellant was removed according to 5 USC 7701(c)(A), 4303 and 5 CFR 432.102-106. His interpretation was different from the agency's interpretation. [USCA5 355].

45. On or about June 15, 2006, Appellant decided to apply for her retirement benefits. Appellant called the Office of Personnel Management, and was told that her retirement application and all of her records from 1968 to the present had been thrown out, because she was not entitled to any benefits. Appellant contacted her U. S. Representative to obtain assistance in obtaining her retirement benefits. Six months later, December, 2006, Appellant received her lump sum retroactive benefits

from the date of her termination August 26, 2005, thru December, 2006. The Office of Personnel Management tried to reconstruct Appellant's wage record, but as of this date it has not been corrected.

46. On or about September 26, 2006, the Merit System Protection Board affirmed the decision to remove Appellant. [USCA5 563].

47. On or about September 28, 2006, Appellant contacted her U. S. Representative to help her receive $7,000 in overpaid health insurance benefits. Six months later, on or about March 1, 2007, petitioner received a check for her overpaid benefits.

48. On or about August 21, 2007, Appellant was notified that her 2005 1040 was under audit. The audit was closed six months later with no change.

49. On or about September 4, 2007, the Agency stated it did not give Appellant a pre-termination hearing prior to her termination. [USCA5 2602].

50. On or about September 4, 2007, the Agency admitted the only way an employee can be removed from their position is by Chapter 43/75. [USCA5 2603].

51. On or about September 4, 2007, the Agency admitted that the Appellant should have received training on her performance appraisal system. [USCA5 2604].

52. On or about September 4, 2007, the Agency admitted that a Merit Systems Protection Board Office of Policy and Evaluation conducted a survey in 1995, and stated that more than 5,700 federal managers and supervisors stated they do not understand the two major processes established by law to remove poor performers, Chapter 43 and Chapter 75. [USCA5 2604].

53. On or about September 4, 2007, the Agency admitted it is very rare that an aspect, within an element, not be rated. [USCA5 2605].

54. On or about September 4, 2007, the Agency admitted that 5 CFR Part 430.101, states that Chapter 43, of Title 5, of the United States Code provides for the performance appraisal of Federal Employees. [USCA5 2604].

55. On or about September 4, 2007, the Agency admitted Form 6774, Receipt of Critical Job Elements for the period, July 1, 2003 thru June 30, 2004 was not signed by Petitioner until February 19, 2004. This was eight months late according to agency regulations. [USCA5 2606].

56. On or about September 4, 2007, the Agency admitted that an under forty employee, under the same supervision as Appellant, who was failing protection of the

Public Interest, received a bonus for 2004. [USCA5 2607].

STATEMENT OF THE CASE

In *Burlington Industries, Inc. v. Ellerth,* 524 U. S. 742 (1998) and *Faragher v. City of Boca Raton,* 524 U. S. 775 (1998), the Supreme Court addressed the scope of the vicarious liability of an employer for the discriminatory and harassing conduct of its supervisors in the context of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §2000e. The Supreme Court held that an employer shall be strictly liable to a victimized employee for an actionable hostile work environment created by a supervisor, when the discrimination or harassment at issue results in a tangible employment action. *Ellerth,* 524 U. S. at 765; *Faragher,* 524 U. S. at 807. The concept of a tangible employment action is distinct from that of a materially adverse employment action, which is a necessary element of a prima facie case under Title VII. See *St. Mary's Honor Center v. Hicks,* 509 U. S. 502, 506-07 (1993).

Appellant filed her original complaint on October 20, 2006 alleging violation of Title VII of the Civil Rights Act based on age, gender, retaliation, including hostile work

environment, wrongful termination, libel and slander and negligent infliction of emotional distress [Docket #1].

On November 9, 2007, Appellee filed a Motion for Summary Judgment on Discrimination Claims and Non-Discrimination Claims and a Motion to Dismiss. [Docket #8].

On January 9, 2008, Appellant filed a Response in Opposition to Defendant's Motion for Summary Judgment and Motion to Dismiss. In this response Appellant withdrew her causes of action for libel and slander and infliction of emotional distress, but preserved her causes of action for retaliation, wrongful termination and violation of rights guaranteed to her under Federal Law. [Docket #22].

On September 29, 2008 Judge Ellison issued the Memorandum and Order granting Defendants Summary Judgment on Discrimination and Non-Discrimination Claims. [Docket #29].

The Final Judgment was issued October 2, 2008. [Docket #30].

On October 24, 2008, Appellant filed a timely Notice of Appeal. [Docket #31].

On May 12, 2009, The Fifth Circuit Court of Appeals AFFIRMED the District Court's Decision.

a. On or about January 6, 1986 thru 1990 Appellant was a GS-7 and 9, working GS 11 and 12 cases. She was paid a GS7 and 9-grade level salary. No other employees in her group were being required to work above their level of pay.

b. On or about September 13, 1988, the manager, gave cases that were to be full-paid within the next few days to a new male Revenue Officer, so that Appellant would not get credit for the closures.

c. On or about October 10, 1988, management reported Appellant to the Inspector General for allegedly stealing government property. After a lengthy investigation of Appellant, the matter was dropped.

d. On or about October 17, 1988, the manager counseled Appellant, as he did not think that Appellant handled a suicide threat made by a taxpayer correctly even though all of the Standard Procedures set out by the Internal Revenue Service were followed.

e. On or about September 26, 1989, the manager, told Appellant to turn over her higher graded cases, on which she had done

substantial work, to him because she would never be promoted.

f. On or about September 27, 1989, a manager's wife was having an affair with a male employee. The male employee was stabbed by another individual in the love triangle. Management told appellant if she talked about the stabbing she would have her appraisal lowered.

g. On or about November 2, 1989, Appellant had her desk searched and dusted for fingerprints by internal inspection and ATF. On November 1, 1989, the IRS office was set on fire. Five months later, with no probable cause, appellant, one of her friends and her union steward were subpoenaed for fingerprints. Appellant was employed by two other federal agencies prior to her employment at Internal Revenue Service, so her prints were already on file with the federal government. After a four-year investigation of Appellant the matter was dropped.

h. On or about the period November 2, 1989 through 1993, the appellant was continually called in to internal inspection for interviews.

i. On or about December 27, 1989, Appellant filed a grievance to get a GS 11 promotion. She finally received the promotion in June, 1991. She became a Revenue officer the same day as fifty other

employees and she was the only one not promoted to a GS 11 in November 1988.

j. On or about March 11, 1990, Appellant was informed she had cancer and needed a hysterectomy. Before Appellant was granted sick leave she had to explain to management exactly why the hysterectomy was needed.

k. On or about May 8, 1990, Appellant was directed by management that she was to spend 2 days a week in the field-visiting taxpayers at their home or place of business. This directive was meant for Appellant only.

l. On or about May 14, 1990, management told Appellant that if she was caught talking to fellow union stewards in the hallway that it would be assumed that she was talking union business and that she would be charged with AWOL. Other management and employees would be enlisted to watch Appellant.

m. On or about May 15, 1990, management reviewed some taxpayer files and searched the file cabinet belonging to Appellant during lunch. When Appellant returned, the files were in complete disarray.

n. On or about May 16, 1990, other employees, who worked in the division with Appellant's sister, came to Appellant and wanted Appellant to comfort her sister who was crying and in distress, because of the

manner that management was treating Appellant.

o. On or about July 30, 1990, the manager gave Appellant a counseling session. The manager became very hysterical during the session and threw Appellant out of the office. That afternoon the National Treasury Employees Union assigned two GS 13 Union Representatives to Appellant to make sure she was not physically harmed.

p. On or about November 26, 1990, after a meeting with IRS management, Appellant was involved in a traffic accident while traveling from the downtown IRS office back to the Alliance office. When she returned to the Alliance Office Appellant was instructed by management to see a doctor at her own expense. Management failed to release Appellant's sister from work so she could accompany Appellant to the medical appointment.

q. On or about June 30, 1992, management at that time gave Appellant notice to come to the office. While in his office, the manager spoke to Appellant in a derogatory manner and put her down continually. It was hard for Appellant to get her composure, and to perform her duties after these sessions. The manager called the Appellant to his office frequently, sometimes several times a day. Appellant was being

harassed and used as an example for the other employees, who knew about the sessions and talked about Appellant. Appellant visited the restroom several times a day to vomit.

r. Starting with the year 1992 thru Appellant's termination date, management used the appraisal for retaliation. They were made very subjective without the use of the prerequisites of Chapter 43. Labor Relations Specialist and Respondent, Stephanie Calister, stated Houston does not prepare appraisals according to The Civil Service Reform Act of 1978 or Title 5, U. S. Code Chapter 43. She stated they follow different laws.

s. On or about December 7, 1992, to further embarrass Appellant the appraisal was lowered and management informed the Las Vegas IRS office that Appellant was not eligible for a promotion to the Las Vegas Office.

t. On or about December, 1992, thru June, 1994, Appellant's sister, also a Revenue Officer, was harassed and forced to take a lower graded position without the Chapter 43 prerequisites.

u. On or about October 6, 1997, management wanted to know if another workable solution could be taken instead of Appellant's evaluation being raised.

v. On or about June 15, 1998, Congress established a separate entity called Treasury Inspector General for Tax Administration to replace IRS internal investigation. This was done to try and discourage IRS management from using the inspection department as a tool for retaliation against employees.

w. On or about March 1, 2005, the agency requested the last ten years medical records and tax returns on Appellant.

x. On July 6, 2005, Appellant was advised by Mr. Gibson and Mr. Arnold to perform clerical and forms room duties, which required heavy lifting, until she was terminated. Both were well aware Appellant suffered a work related back injury in 2004.

1. PRIMA FACIE CASE OF SEX DISCRIMINATION.

James Whaley, Senior Program Analyst and Union Steward stated during the EEO hearing that no man would have been treated the way Appellant was treated at the agency. [USCA5 2134, Page 229, Lines 12-18]. Appellant has shown she was a member of a protected class, she was qualified for the position she sought if not for the illegal preparation of the evaluation that caused her termination and others similarly situated but outside the protected class were

treated more favorably. Mr. Gibson, supervisor of Appellant, stated Appellant is the first federal employee that he has removed from federal service in his 20 years of management.

2. PRIMA FACIE CASE OF AGE DISCRIMINATION.

Retaliation against employees because they oppose unlawful employment discrimination is prohibited by the Age Discrimination in Employment Act. The Supreme Court stated in *O'Connor v. Consolidated Coin Caters,* 517 U. S. 308, (1996) that an older employee need not prove that they were replaced by a younger worker. An under age 40 employee, under the same supervisor as Appellant, was given an award after she failed a sub-element, but Appellant was removed from her Federal position for the same alleged offense. The Office of Personnel Management is in charge of keeping statistics on the number of employees removed under Chapter 43 or 75. During the year 2005, the same year that Appellant was removed from her position, the Office of Personnel Management, under Chapter 43, shows 14 females under age 40 being removed, while 103 females over the age of 40 had been removed. [USCA5 2604]. The Office of Personnel Management shows 27

males under the age of 40 being removed and 90 males over the age of 40 being removed from their federal position. Appellant has shown she was terminated, she was qualified for the Revenue Officer position she held for twenty years if not for the illegal preparation of the performance evaluation that caused her termination, she was within the protected class at the time of her termination and she does not need to prove she was replaced by a younger worker. Appellant was discharged because of her age. In November, 2003, just six weeks before retirement age of 55, Appellant was notified her work was unacceptable.

3. PRIMA FACIE CASE OF SEXUAL HARASSMENT

Appellant states she belonged to a protected group; and was subjected to communication or conduct on the basis of sex; [see item #23, page 10]. All Female Revenue Officers except for one, are reluctant to approach or talk to Mr. Gibson [USCA5 2574]. In 2006, less than a year after Appellant was terminated, another female employee, over the age of 40, under the same supervision as Appellant, was suddenly told her performance was not acceptable and she would be terminated. James, Whaley, Senior Program Analyst and Union Steward, for

Appellant stated during the EEO hearing that no man would have been treated the way Appellant was treated at the agency. [USCA5 2134, Page 229, Lines 12-18.] Appellant was not subjected to unwelcome sexual conduct or communication while Mr. Gibson was her manager, but Appellant had to witness inappropriate behavior by Mr. Gibson in previous years as he conducted his private life at work. His behavior substantially interfered with Appellant's employment and created an intimidating, hostile, and offensive work environment. All the above actions took place within the scope of employment.

The Supreme Court concluded that under Title VII "[a] trier of fact may find sexual harassment when "the harasser is motivated by general hostility to the presence of women in the workplace." quoting *Oncale v. Sundowner Offshore Services, Inc.* 523 US 75, 80; 118 S. Ct. 998; 140 L Ed 2d 201 (1998).

"To be sure, the phrase "sexual harassment" can be a misnomer. As several [federal] circuits have now recognized, the touchstone of an actionable sexual harassment claim is not whether the offensive conduct includes "sexual advances or other incidents with clearly sexual overtones." The critical inquiry "is whether members of one sex are exposed

to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Harris v. Forklift Systems, Inc., 510 US 17, 25; 114 S. Ct. 367; 126 L Ed. 2d 295 (1993).* Only by acknowledging the link between sexual conduct and gender-based inequality can the sexual-harassment provision be rationally applied.

A supervisor may engage in unlawful discrimination with the purpose, mistaken or otherwise, to serve the employer. This is where the employer has a policy of discouraging women from seeking advancement. *Ellerth,* 524 U. S. at 757. The employer is liable for the tortuous acts of its management when they are "aided in accomplishing the tort by the existence of the agency relation." This has come to be known as the "aided in the agency relation standard." *Ellerth,* 524 U. S. at 759. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent "to strike at the entire spectrum of disparate treatment of men and women in employment," which include people to work in a discriminatorily hostile or abusive environment. Mr. Gibson, Appellant's supervisor, treated men and women under his supervision disparately. After he terminated Appellant in 2005, he

intimidated, ridiculed and insulted three additional women under his supervision to try and get them to retire. One over forty female did retire under pressure. One over forty female was dealing with mental health issues and his treatment of her made her condition worse.

The treatment Appellant suffered while employed at the IRS caused her a tangible psychological injury. While under the supervision of Mr. Gibson and other managers at IRS Appellant sought the services of a mental health expert.

4. PRIMA FACIE CASE OF HOSTILE WORK ENVIRONMENT.

The applicable standard is stated in *Mentor Savings Banc. V. Vinson,* 477 U. S. 57. Title VII is violated when the workplace is permeated with discriminatory behavior that is sufficiently severe. This stand requires an objectively hostile or abusive environment. It requires the type of environment that a reasonable person would find hostile or abusive, as well as the victim's suggestive perception that the government is abusive. *Harris v. Forklift Systems, Inc.,* 510 U. S. 21-22 (1993). The Supreme Court has held that an employer is liable for actionable hostile environment sexual harassment by a

supervisor with immediate (or higher) authority over the harassed employee. If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense. *Burlington Industries, Inc., v. Ellerth,* 118 S. Ct. 2257 (1998) and *Farragher v. City of Boca Raton.*

In the twenty years Appellant was employed by the IRS, six of her managers had relationships with their employees while Appellant was under their supervision.

In the *Pollard* case, the Supreme Court also addresses the hostile environment caused by employee relationships. *Pollard v. E. I. Dupont de Nemours & Co.,* 121 S. Ct. 1946 (Sup Ct. 2001). The work environment was sufficiently hostile to constitute intentional discrimination. The discrimination was pervasive and regular and the defendants' conduct detrimentally affected Appellant and the defendants' conduct was sufficiently hostile to offend a reasonable person. Appellant asked several members of management to discontinue their relationships with employees but was only faced with more harassment and a lower performance evaluation. Appellant also raised her concerns to the Inspector General

but the Inspector General never addressed the issue. The harassment was severe and pervasive and lasted the entire twenty years that Appellant was employed by the IRS.

5. PRIMA FACIE CASE OF RETALIATION.

Retaliation against employees because they oppose unlawful employment discrimination is prohibited by Title VII of the Civil Rights Act of 1964. In order to prove a retaliation claim under Title VII, an individual must demonstrate (1) a "protected activity" was engaged in (that is, opposed discrimination or participated in a discrimination proceeding); (2) the alleged retaliator knew of the protected activity; (3) the claimant was subjected to an adverse employment action; Under *Burlington N. & Santa Fe Ry. Co. v. White,* 548 U. S. 53, 67-68 (2006) and employee need not suffer an "adverse action" to establish a prima facie case of retaliation, but instead only must show that a reasonable employee would have found the challenged action "materially adverse." Meaning "it might well have dissuaded a reasonable worker from making or supporting a charge of discrimination."
(4) and a causal connection existed between the protected activity and the adverse employment action. Appellant has shown

she engaged in a protected activity, the IRS took a materially adverse action against her, such that it could dissuade a reasonable worker from making or supporting a charge of discrimination and that a causal relationship existed between the protected activity and the materially adverse activity. In this case both opposition and participation retaliation claims are involved.

Adverse actions that are the basis of a retaliation claim are: (1) denial of promotion, (2) refusal to hire, (3) denial of job benefits, (4) demotion, suspension, (5) transfer to a more difficult position, (6) threats, (7) reprimands, (8) negative evaluations, and (9) severe and pervasive harassment. Appellant suffered denial of promotion, denial of job benefits, transfer to a more difficult position, threats, reprimands, negative evaluations and severe and pervasive harassment. In his EEO testimony on July 8, 2005, Alex Hernandez, former manager of Appellant, stated appraisals are used for retaliation. [USCA5 2170, p. 375, Ln. 6-14] Adverse actions continued after Appellant was terminated. Her retirement records were destroyed and her 2005 tax return was subject to audit. Proof that the adverse action was a result of engagement in protected activity can be direct or circumstantial. The circumstantial evidence demonstrating that the protected activity,

and the adverse action, were linked, frequently includes a showing that the adverse action occurred shortly after the protected activity. See Page 9, #15, 16 and Page 13, # 31, 32, 33, 34 and 35. The Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White,* 548 U. S. 53 (2006), also held that an employee could bring a claim for retaliation based on conduct that occurred years earlier, as long as the employee alleges that it is part of a pattern of retaliatory conduct. Appellant has sited a pattern of retaliatory conduct. The Court of Appeals for the 10th Circuit has held that a negative evaluation leading to an employee's termination constitutes an adverse employment action for retaliation purposes.

6. WHISTLEBLOWER RETALIATION

Appellant made protected disclosures that she felt was a violation of law, rule or regulation, or gross mismanagement, a gross waste of funds, an abuse of authority, and a substantial and specific danger to public health or safety. citing USC 2302 (8)(A)(i)(ii) and USC 2302 (8) (B)(i)(ii) Appellant reported a fellow employee to Treasury Inspector General for Tax Administration because she believed the employee was inflating his travel voucher. This happened under the supervision of Mr. Gibson in

August 2004. Appellant reported to the Inspector General the sexual relationships between management and employees. This disclosure to the Inspector General took place in 1998. The management-employee relationships existed at the time the appellant staring working at IRS in 1985 and to her knowledge continued to 2004.

7. PRIMA FACIE CASE UNDER MCDONNELL DOUGLAS TEST.

Appellant has shown that she was a member of a protected class, she would have been qualified for her position if not for the illegal preparation of the evaluation that caused her termination, she was terminated on August 26, 2005 from her position, and another similarly situated Revenue Officer was treated more favorably. *Rutherford v. Harris County,* 197 F. 3d 173, 185 (5th Cir. 1999).

8. A JURY SHOULD DECIDE THE CREDIBILITY OF THE APPELLANT AND THE DEFENDANT.

Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. *Reeves v. Sanderson Plumbing Prods., Inc.,* 530 U. S. 130, 150-51

(2000) (quoting *Anderson,* 477 U. S. at 250-51).

9. THE CHAPTER 43 PREREQUISITES OF THE CIVIL SERVICE REFORM ACT ARE REQUIRED TO BE FOLLOWED BY THE AGENCY TO CONDUCT A PERFORMANCE EVALUATION.

The provisions of 5 U. S. C. Chapter 43 became law as part of the Civil Service Reform Act of 1978, Pub. L. 95-454, 92 Stat. 1111, and were referred to as the "centerpiece of civil service reform." Thus, the new provision was entitled "performance appraisal." A comprehensive summary of Chapter 43 procedures can be found in *Lovshin v. Dept. of Navy,* 767 F. 2d 826 (Fed Cir 1985).

The IRS, MSPB and the court all disagree on how Appellant was terminated from her federal position. The IRS states Appellant was removed according to the Internal Revenue Manual. The MSPB found that Appellant was removed according to 5 USC 7701(c)(1)(A) and 4303 and 5 CRF 432 102-106 without making the proper analysis or findings required by Civil Service Reform Act of 1978, Chapter 43 or 75. 5 CFR 432.101 states the agency is to follow Chapter 43 prerequisites to conduct a performance

evaluation. The decision was not based on substantial **LEGAL** evidence for Chapter 43 or preponderance of the evidence for Chapter 75 as required by the statute. The decision violated Appellant's due process rights, and was in excess of Judge Carnes' authority. Judge Carnes told Appellant, "can't you see they don't want you there anymore. Why don't you just retire?" The lower court did not address the lack of substantial **LEGAL** evidence, Chapter 43, and its prerequisites, or the lack of preponderance of the evidence under Chapter 75.

10. The difference between a critical element, sub-element, aspect, performance standards, progress reviews and performance evaluations.

Critical Element – A critical element is a work assignment or responsibility of such importance that unacceptable performance on that element would result in a determination that an employee's overall performance is unacceptable. Appellant had five critical elements. 1) Employee Satisfaction-Contribute, 2) Customer Satisfaction-Knowledge 3) Customer Satisfaction-Application 4) Business Results-Quality 5) Business Results-Efficiency

Sub-Element – There are 3 sub-elements under each critical element. Critical Element 1: Workplace Interaction, Workplace Involvement, and Workplace Environment. Critical Element 2: Taxpayer Rights, Case Analysis and Protection of the Public Interest. Critical Element Critical Element 3: Responsive, Courteous Service, Communication and Compliance Critical Element 4: Investigation, Problem Solving Techniques and Documentation. Critical Element 5: Timely Action, Inventory Management and Planning and Scheduling. The IRS determined that the appellant failed to do timely actions on six taxpayer files, sub-element of critical element 5, and that resulted in a failure of Inventory Management on an additional six taxpayer files which is sub-element 2 of critical element 5. This caused her termination after 20 years as a Revenue Officer.

Aspect – Defines how an employee accomplishes her performance under the sub-element to meet the critical element. The sub-elements have from 2-10 aspects. The aspects were never used to perform the performance evaluation. Mr. Gibson stated this fact during the MSPB hearing.

Performance Standards–Appellant's performance standards were Consistently, Generally and More Than Occasionally.

Progress Reviews are conducted sporadically. Performance Evaluations are conducted on an annual basis.

REASONS FOR GRANTING THE PETITION

Millions of federal employees depend on the objective and accurate preparation of the performance appraisal to determine their rating for promotions, eligibility for a performance award and ultimately the amount of their monthly retirement. Many federal employees who are close to retirement have been terminated based on flimsy pretextual reasons when their contract rights, due process rights, and constitutional rights have been violated. The subjective approach by the Respondents on the preparation of the appraisal causes low morale in the federal work force. This is a ripe issue and affects thousands of Federal employees today.

CONCLUSION

Appellant's removal was conducted without a pre-termination hearing, which

was a direct violation of the Fifth Amendment. The core to due process is the right to notice and a meaningful opportunity to be heard, *Cleveland Bd. Of Ed. V. Loudermill,* 470 U. S. 532, 542 (1985). An individual's right to due process is violated if the agency does not follow the provisions of the *Civil Service Reform Act of 1978.*

Appellant has the right to be free from retaliation. The appraisal was used as retaliation. This is a violation of the First Amendment. It is also a violation of the Fifth Amendment Due Process, Liberty and Property Interest Rights.

For the reasons stated herein, the Petition for Writ of Certiorari should be granted. The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit should be reversed and this case remanded for a trial.

Respectfully submitted,

/s/_____

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APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED MAY 12, 2009

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 08-20712
Summary Calendar

DONNA J ARENSDORF

Plaintiff-Appellant

v.

TIMOTHY F. GEITHNER, Secretary of the Treasury

Defendant-Appellee

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 4:06.cv.3324

Before HIGGINBOTHAM, BARKSDALE, and ELROD, Circuit Judges.
PER CURIAM:

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4

Appendix A

At issue are numerous claims by Donna J. Arensdorf, a former Internal Revenue Service (IRS) employee, against the IRS, arising out of its termination of her employment. Arensdorf appeals as adverse summary judgment on all claims.

Arensdorf was employed as an IRS revenue officer from October 1985 until August 2005, ultimately reaching the GS -11 classification. Arensdorf received poor performance reviews from her supervisor, Gibson, on various evaluations in November 2003, and February and June 2004, including overall performance ratings of "unacceptable" on her mid-year progress review and her annual performance appraisal. In August 2004, she was given an "Opportunity Letter" by Gibson. That letter established a 90 day-day "Performance Improvement Period", during which Arensdorf was to improve her performance (or face termination); identified specific instances of Arensdorf's shortcomings, including missed deadlines and omissions in her case files; provided or referenced applicable IRS standards for the deficiencies identified; and described other resources that she could use to improve performance.

The day after she received the Opportunity Letter, Arensdorf began a six-

month sick leave. When Arensdorf returned to work in March 2005, Gibson immediately reissued the Opportunity Letter, giving her an additional 90 days to improve her performance; she was provided with an "On the Job Instructor", to assist with case management; and her cases were reviewed on a bi-weekly basis by Gibson and also, at times, by Gibson's supervisor. At the end of the 90-day period, Arnold proposed Arensdorf's termination; the area manager approved Arnold's proposal; and in August 2005, Arensdorf was terminated.

That month, Arensdorf filed a complaint with the Merit System Protection Board (MSPB), challenging her termination. The MSPB sustained her termination. Arensdorf appealed that decision to the full board, and it was again sustained. She next contested the MSPB's decision in district court.

There, Arensdorf urged claims for sex and age discrimination, sexual harassment, hostile work environment, and retaliation. In addition to her discrimination-based claims, she also urged several non-discrimination-based claims, largely consisting of challenges to the MSPB decision and the means used to arrive at that decision; and a retaliation claim under

the Whistleblower Protection Act, 5 U. S. C. §2302. In September 2008, the district court granted summary judgment to the IRS on all claims.

Arensdorf presents ten issues for review. These contentions essentially challenge the summary judgment, which is reviewed *de novo*. E.g., *Gibson v. U. S. Postal Serv.*, 380 F. 3d 886, 888 (5th Cir 2004). "Summary judgment is appropriate when, considering all of the allegations and evidence, and drawing all inferences in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. (citing *Little v. Liquid Air Corp.*, 37 F. 3d 1069, 1075 (5th Cir. 1994)). Additionally, we may affirm the summary judgment on any grounds supported by the record. *E.g., Berquist v. Washington Mut. Bank*, 500 F. 3d 344, 349 (5th Cir. 2007), *cert. denied* 128 S. Ct. 1124 (2008).

In a "mixed case" appeal from the MSPB (discrimination-based and non-discrimination-based claims), "discrimination claims raised administratively" are reviewed *de novo*. *Aldrup v. Caldera*, 274 F. 3d 282, 285-86 (5th Cir. 2001) (citing 5 U. S. C. §7703(c) (regarding judicial review of MSPB

decisions)). On the other hand, "non-discrimination claims based on the administrative record" are reviewed with deference; we "will uphold the [MSPB]'s determinations unless they are clearly arbitrary and capricious, unsupported by substantial evidence or otherwise not in accordance with law". *Id.* at 287. Essentially for the reasons stated by the district court in its comprehensive opinion, the judgment is affirmed.

To establish a *prima facie* case of sex discrimination under Title VII of the Civil Rights Act of 1964, Arensdorf "was required to show: (1) she is a member of a protected class; (2) she was qualified for the position she sought; (3) she suffered an adverse employment action; and (4) others similarly situated but outside the protected class were treated more favorably". *Alvarado v. Texas Rangers*, 492 F. 3d 605, 611 (5th Cir. 2007) (citing *Willis v. Coca Cola Enters., Inc.*, 445 F. 3d 413, 420 (5th Cir. 2006)); *see also 42 U. S. C. § 2000e et. seq.* Arensdorf fails to establish a *prima facie* case of sex discrimination because, *inter alia*, "she offers no evidence that she was qualified for her position". *Arensdorf v. Paulsen*, No. 4:06-CV-3324 (S. D. Tex 29 Sep 2008) (unpublished).

The record contains ample documentation of her deficient job performance.

Arensdorf"s age discrimination claims fails for essentially the same reason. To establish a *prima facie* case of age discrimination under the Age Discrimination in Employment Act, Arensdorf was required to show: "(1) [s]he was discharged; (2) [s]he was qualified for the position; (3) [s]he was within the protected class at the time of discharge; and (4) [s]he was either i) replaced by someone outside the protected class, ii) replaced by someone younger, or iii) otherwise discharged because of h[er] age". *Baker v. Am. Airlines, Inc.*, 430 F. 3d 750, 753 (5th Cir. 2005) (quoting *Machinchick v. PB Power, Inc.*, 398 F. 3d 345, 350 (5th Cir 2005)); *see also* 29 U. S. C. § 623 *et seq.* Arensdorf fails to establish a *prima facie* case of age discrimination because, *inter alia,* she fails to show she is qualified for her position.

Arensdorf's sexual-harassment and hostile work-environment claims fail as well. To establish a *prima facie* case of sexual harassment under Title VII, Arensdorf was required to show that: "(1)...[she] belongs to a protected class; (2) . . . [she] was subject to unwelcome sexual harassment; (3) . . . the harassment was based on sex; and (4) . . . the

harassment affected a term, condition, or privilege of employment". *Aryain v. Wal-Mart Stores Tex.* LP, 534 F. 3d 473, 479 (5th Cir. 2008) (quoting *Lauderdale v. Tex. Dep't of Criminal Justice, Institutional Div.*, 512 F. 3d 157, 163 (5th Cir. 2007)). Similarly, to establish a *prima facie* case of hostile-work environment, Arensdorf was required to show that: "(1) she belongs to a protected class; (2) was subject to unwelcome sexual [or racial] harassment; (3) the harassment was based on her sex [or race]; (4) the harassment affected a term, condition, or privilege of her employment; and (5) [her employer] knew or should have known of the harassment and failed to take remedial action". *Cain v. Blackwell*, 246 F. 3d 758, 760 (5th Cir. 2001) (addressing a sexually-hostile work environment); *see also Ramsey v. Henderson*, 286 F. 3d 264, 268 (5th Cir. 2002) (addressing a racially-hostile work environment). Arensdorf complains, *inter alia*, of workplace teasing, ridicule, and criticism. Even assuming Arensdorf satisfies the other requirements for these claims, she has not shown the severity of harassment necessary to establish a *prima facie* case of sexual harassment and a hostile-work environment. *See, e. g., Turner v. Baylor Richardson Med. Ctr.*, 479 F. 3d 337, 348 (5th

Cir. 2007) ("simple teasing, offhand comments, and isolated incidents, (unless extremely serious) will not amount to discriminatory charges that can survive summary judgment." (internal quotation marks and citation omitted)).

To establish a *prima facie* case of retaliation, the last of her discrimination-based claims, Arensdorf was required to "show that: (1) she participated in an activity by Title VII; (2) her employer took an adverse employment action against her; and (3) a casual connection exists between the protected activity and the materially adverse action". *Aryain*, 534 F. 3d at 484 (citing *McCoy v. City of Shreveport*, 492 F. 3d 551, 557 (5th Cir. 2007)). The protected activity cited by Arensdorf was her filing Equal Employment Opportunity complaints involving her supervisors in July and September 2004, approximately one year prior to her termination. Arensdorf provided no evidence, other than her own assertions, of the requisite causal connection. In any event, even assuming Arensdorf has established a *prima* facie case of retaliation, the IRS met its shifted burden by articulating a legitimate, non-retaliatory reason (deficient job performance) for her termination. *See id.* Accordingly, to avoid

summary judgment, Arensdorf was required to show the IRS' reason for terminating her was pretext. *See id.* The record contains substantial documentation of her deficient performance.

Arensdorf's other claims concern general-sufficiency-of-the-evidence and genuine-issue-of-material-fact challenges; the IRS' claimed failure to comply with the Civil Service Reform Act of 1978, Pub L. No. 95-454, 92 Stat. 1111 (codified in scattered sections of 5 U. S. C.); the tapes of her MSPB hearing containing "gaps"; and claimed retaliation by the IRS, in violation of the Whistleblower Protection Act, 5 U. S. C. § 2302.

None of these claims has merit. The sufficiency-of-the-evidence and general-issue-of-material fact challenges were essentially addressed *supra;* Arensdorf did not meet her burden with respect to the discrimination-based claims, and the IRS provided ample evidence of her deficient job performance.

Arensdorf's claims based on the Civil Service Reform Act essentially concern the means used by the IRS to arrive at the termination decision and by the MSPB to review it. The MSPB addressed and rejected these claims as they pertain to the IRS' actions; and the district court conducted its

review using the appropriate, deferential standard. *See Aldrup*, 274 F. 3d at 287; *Girling Health Care, Inc. v. Shalala*, 85 F. 3d 211, 215 (5th Cir. 1996). The MSPB's decision affirming Arensdorf's termination is in accordance with the law and supported by substantial evidence.

Arensdorf's claims regarding purported "gaps" in the tapes of the MSPB hearing were reviewed by the district court; it found the tapes to be complete. Arensdorf has not shown clear error. *E. g., Garcia v. LumaCorp, Inc.*, 429 F. 3d 549, 553 (5th Cir. 2005).

Finally Arensdorf devotes a few sentences to the whistleblower retaliation claim without citations to the record or case law. Accordingly, this claim is waived as inadequately briefed. *E. g. Adams v. Unione Mediterranea Di Sicurta*, 364 F. 3d 646, 653 (5th Cir 2004) ("Issues not raised or inadequately briefed on appeal are waived.").

AFFIRMED.

APPENDIX B - FINAL JUDGMENT ISSUED BY THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED OCTOBER 2, 2008

DONNA J. ARENSDORF
Plaintiff,

v. **CIVIL ACTION NO. 6-cv-03324**

HENRY M. PAULSEN,
Secretary of the Treasury

Defendant.

FINAL JUDGMENT

Pursuant to FED. R. Civ. P. 58(a), and for the reasons set forth in the Court's Memorandum and Order (Doc No. 29, judgment is herby **ENTERED** for Defendant.
Plaintiff's claims are **DISMISSED WITH PREJUDICE.**

IT IS SO ORDERED.

SIGNED at Houston, Texas on this the 2nd day of October, 2008

Exhibit B

s//_____
KEITH P. ELLISON
UNITED STATES DISTRICT JUDGE

To ensure proper notice, each party who receives this order shall forward a copy of it to every other party and affected non-party even though they may have been sent one by the court..

APPENDIX C – MEMORANDUM AND ORDER FILED BY THE DEFENDANT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION DATED SEPTEMBER 29, 2008.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DONNA ARENSDORF,

Plaintiff,

v. **CIVIL ACTION NO. -06-3324**

HENRY M. PAULSEN, SECRETARY OF THE TREASURY

Defendant

MEMORANDUM AND ORDER

Before the Court are Defendant's Motion for Summary Judgment on Discrimination Claims (Doc No. 8), Motion for Summary Judgment on Non-Discrimination Claims (Doc No. 9), and Motion to Dismiss (Doc No. 10). After considering the parties' filings and the

applicable law, the Court finds that Defendant's Motion for Summary Judgment on Discrimination Claims and Motion for Summery Judgment on Non-Discrimination Claims should be granted. Defendant's Motion to Dismiss should be granted as moot.

I. BACKGROUND

A. Plaintiff's Employment History.

Plaintiff was employed as a revenue officer for the Internal Revenue Service from October 15, 1985, until August 26, 2005, ultimately reaching the GS-11 classification. From May 2002 to August 2005, James("Al") Gibson directly supervised Plaintiff's work. On November 19, 2003, Gibson gave Plaintiff a mid year progress review indicating that she had an overall "unacceptable" performance.

As a result of her failing performance< Gibson recommended that Plaintiff remove herself from the so-called Flexi-place program. Removal from Flexi-place indicates that an employee might need additional guidance available in the office. (Doc No. 8., Ex. 15.) On February 2, 2004,

and June 3, 2004, Gibson issued two Case Review Narratives indicating that Plaintiff was failing in a number of performance areas. (Doc. 8., Ex. 16; Ex. 17.) On June 3, 2004, Gibson gave Plaintiff an "unacceptable" rating in her Annual Performance Appraisal. (Doc. No. 8, Ex. 21.)

On August 31, 2004, Gibson gave plaintiff am "Opportunity Letter" explaining that she had ninety days to improve her performance or she should face termination. (Doc. No. 8, Ex. 23.) The IRS terms this interval the "Performance Improvement Period" or PIP." The Opportunity Letter identified specific instances of Plaintiff's shortcomings by listing missed deadlines and omissions in her case files. It also provided the IRS's accepted standards for performing certain tasks by referring to the Internal Revenue Manual's guidelines. Finally, the letter described the resources Plaintiff could use to improve her performance during the PIP.

The day after she received the Opportunity Letter, Plaintiff began a six-month sick leave that lasted until March 1, 2005. When the Plaintiff returned to work, Gibson immediately reissued the Opportunity Letter, giving Plaintiff an additional ninety days to improve her

performance. (Doc. No. 8, Ex. 24; Ex. 25.) During the PIP, Plaintiff was given an On the Job Instructor ("OIJ"), Sue Burton, who could assist her in managing her cases. Gibson, and at times his supervisor, Martin Arnold, reviewed the Plaintiff's cases on a bi-weekly basis during this period.

Following the end of the PIP, Arnold informed the Plaintiff that he was proposing her removal, (Doc. No. 8, Ex. 26.) Ellen Dolby, the Area Manager, approved his proposal, and on August 26, 2005, Plaintiff was terminated. (Doc. No. 8, Ex. 27.)

B. Plaintiff's EEOC and TIGTA Activity

Plaintiff filed a number of grievances throughout her career at the IRS and while she was working for Gibson. In particular, she filed Equal Employment Opportunity ("EEO") complaints on July 14, 2004 and September 24, 2004. (Doc. No. 8, Ex. 1; Ex. 2.) Both complaints alleged that she suffered from a hostile work environment, based on her race and sex, because her transfer request was denied. She alleged that both Gibson and Arnold took part in the discriminatory treatment.

Plaintiff also filed grievances with the Treasury Inspector General for Tax Administration ("TIGTA") while she ws

working for Gibson, (Doc. No. 8, Ex. 28; Ex. 29.) On August 3, 2004, she reported that a co-worker was inflating his travel vouchers. *Id.* That same day, she filed another referral claiming that Arnold and Gibson harassed her and gave her poor evaluations on the basis of her EEO complaints against them. (Doc. 8, Ex. 30.) On October 3, 2004, Plaintiff filed her final TIGTA grievance, alleging that her manager was retaliating against her for her recent EEO complaints. (DOC. No. 8, Ex. 33.)

C. Procedural History

Plaintiff appealed her removal to the Merit Systems Protection Board ("MSPB"). The MSPB sustained her removal in its Initial Decision. (Doc. No. 8, Ex. 10.) Plaintiff then appealed the Initial Decision to the Full Board. The Full Board sustained the Initial Decision and issued a Final Decision. *Id.* Plaintiff appealed to this Court.[1] Defendants moved for summary judgment on Plaintiff's discrimination and non-discrimination claims and moved to dismiss Plaintiff's tort law claims.

II. SUMMARY JUDGMENT STANDARD

Appendix C

A motion for summary judgment under Federal Rule of Civil Procedure 56 requires the Court to determine whether the moving party is entitled to judgment as a matter of law based on the evidence thus far presented. FED. R. CIV. P.56(c). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Kee v. City of Rowlett*, 247 F. 3d. 206, 210 (5th Cir. 2001) (quotations omitted). A genuine issue of material fact exists if a reasonable jury could enter a verdict for the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U. S. 242, 252 (1986) ("The existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff."); *Crawford v. Formosa Plastics Corp.*, 234 F. 3d 899, 902 (5th Cir. 2000). The Court views all evidence in the light most favorable to the non-moving party and draws all reasonable inferences in that party's favor. *Crawford*, 234 F. 3d at 902. "Credibility determinations, the weighing of evidence, and the drawing of legitimate

inferences from the facts are jury functions, not those of a judge," *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U. S. 130, 150-51 (2000) (quoting *Anderson*, 477 U. S. at 250-51).

[1] In July 2005, Plaintiff filed Complaint H-05-cv-2622 in the Southern District of Texas, complaining of a hostile work environment. In that matter the court granted Defendant's request for summary judgment. Plaintiff's appeal of that decision is pending before the Fifth Circuit of Appeals.

III. PLAINTIFF'S DISCRIMINATION CLAIMS

A. Sex Discrimination Claim

Plaintiff claims that she was discriminated against on the basis of sex in violation of Title VII of the Civil Rights Act of 1964, 42 U. S. C. §§ 2000c-2000e-17. "Title VII prohibits employers from discriminating against employees on the basis of race, color, religion, sex, or national origin." *Grimes v. Texas Dep't of Mental Health*, 102 F. 3d 137, 140 (5th Cir. 1996). Title VII claims are subject to the burden-shifting framework established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792 (1973).

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To satisfy the McDonnel test, a plaintiff must first establish a prima facie case of discrimination. To do that, she must "demonstrate that (1) she is a member of a protected class, (2) she was qualified for her position, (3) she suffered an adverse employment action, and (4) others similarly situated were more favorably treated." *Rutherford v. Harris County,* 197 F. 3d 173, 185 (5th Cir. 1999). The burden then shifts to defendant to articulate a legitimate, nondiscriminatory reason for the employment action. *McDonnel Douglas,* 411 U. S. at 802; *Urbano v. Continental Airlines, Inc.* 138 F. 3d 204, 206 (5th C8r. 1998), *cert. denied.* 525 U. S. 1000 (1998).

In the instant case, Plaintiff fails to present a prima facie case of sex discrimination, because she offers no evidence that she was qualified for the position. Defendant's records indicate that plaintiff had a failing job performance beginning in November 2003, and Plaintiff herself admits that she received poor ratings from supervisors at different times throughout her career. (Doc. No. 8, Ex. 38, at 91:8-15.) Sue Burton, Plaintiff's OJI, testified at the MSPB hearing that she identified many areas where Plaintiff was struggling in her work, but Plaintiff refused

to accept assistance. (Doc. No. 8, Ex. 10.) Plaintiff argues that her job evaluations were conducted using out-dated, subjective standards that unfairly applied to her work. (Doc. No. 8, Ex. 38, at 43-44.)

Plaintiff's employment history, and Sue Burton's testimony, are persuasive evidence that the Plaintiff was not qualified for her position. The standards used to evaluate Plaintiff in her performance appraisals, and the standards presented to her in the Opportunity Letter, make frequent reference to the Internal Revenue Manual ("IRM"). The IRM is the operating manual for revenue officers, and it contains specific guidelines and timeframes for performing certain tasks. It is evident in reviewing Plaintiff's employment record that she did not complete certain tasks in the time required. Plaintiff testified that she did not believe these standards were correct; however, the MSPB determined that the standards are correct and were made available to the Plaintiff on several occasions. (Doc. No 8, Ex. 10.) Plaintiff offers no evidence to contradict the MSPB's determination.

The Court is hesitant to decide the case on these grounds alone, however, because objective standards can be applied to

different employees with varying levels of rigidity. Nevertheless, Plaintiff still fails to demonstrate a prima facie case of sex discrimination because she offers no evidence that similarly situated male employees were treated more favorably. Plaintiff never makes any specific allegation of discrimination on the basis of her sex. Plaintiff does assert that everyone in her revenue officer class received a GS-11 rating before her, but she presumably means that both the males and the females received promotions before her. (Doc. No. 8, Ex. 34, v. 6, tab 4n2-2).

In her affidavit to the Court, Plaintiff states:

"On December 8, 2004, Karen Ytuarte, another employee in Gibson's group, stated in her EEO Declaration, that in our Survey Feedback Session the group pointed out approximately thirty negative behavioral traits exhibited by Mr. Gibson. She also stated that all but one female revenue officers has had difficulty working with Mr. Gibson. Female revenue officers are reluctant to approach or talk with Mr. Gibson."

(Doc. No. 8, Ex. 22, at 4.) Such allegations, if substantiated, would be prima

facie evidence of discrimination. Plaintiff does not present any documents or testimony supporting this statement, however, rendering it naked hearsay. Statements used to refute summary judgment must be admissible at trial. FED R. CIV. P. 569e)(1); *McIntosh v. Partridge,* 540 F. 3d 315, 322 (5th Cir 2008). Significantly, Plaintiff does not allege that she experienced any of this treatment herself; she can only base a claim on discrimination that she experienced personally. *Septimus v. University of Houston,* 399 F. 3d 601, 612 (5th Cir. 2005).

Finally, at the Plaintiff's EEO hearing on July 8, 2005, James A. Whaley, the Plaintiff's union steward, testified about the source of the Plaintiff's problems with management:

"I think partially because she was a woman because of the fact that they didn't do that-they would never have done that to her is she had been a man. They expected the women to be a lot more submissive; and obviously if a man was assertive, they didn't seem to have a problem with a man standing up to them as they did with females."

(Doc. No. 8 Ex. 38, 229: 12-20.) If this statement were corroborated, it would also be prima facie evidence of discrimination.

Such unsupported speculation, however, is not competent summary judgment evidence. *See, e. g. Eason v. Thaler,* 73 F. 3d 1322, (5th Cir 1996). Accordingly Plaintiff fails to present a prima facie case of sex discrimination.

B. Age Discrimination

Plaintiff also alleges that she was discriminated against on the basis of her age. Under the Age Discrinimation in Employment Act ("ADEA'). "[i]t shall be unlawful for an employer. . . to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age." 29 U. S. C. § 623(a)(1). "When a plaintiff alleges disparate treatment, liability depends on whether the protected trait (under the ADEA, age) actually motivated the employer's decision." *Reeves v. Sanderson Plumbing Prods., Inc.* 530 U. S. 133, 131 (2000).

To prove age discrimination a "plaintiff must show that (1)[she] was discharged; (2) [she] was qualified for the position; (3) [she] was within the protected at the time of the discharge; and (4) [she] was either i) replaced by someone outside the

protected class, ii) replaced by someone younger, or iii) otherwise discharged because of [her] age." *Palasota v. Haggar Clothing Co.*, 342 F. 3d 569, 576 (5th Cir. 2003) (quoting *Bodenheimer v. PPG Indus. Inc.*, 5 F. 3d 955, 957 (5th Cir. 1993)).

Once again, because the Plaintiff does not show that she was qualified for her job, she cannot satisfy the required criteria. Additionally, Plaintiff presents no evidence that she was replaced with a younger officer or that younger employees received preferential treatment. Plaintiff does assert that, "on May 23, 2007, Office of Personnel Management sent me an email stating that of the 231 employees removed under Ch. 43 for the year 2005, one hundred and ninety three were over the age of forty." Plaintiff provides no documents to support this evidence, and draws no conclusions demonstrating systematic discrimination. Such a generalized allegation does not establish a prima facie case of age discrimination. Such a generalized allegation does not establish a prima facie case of age discrimination. *Septimus*, 399 F. 3d at 611.

C. Sexual Harassment and Hostile Work Environment

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Plaintiff also alleges she suffered from sexual harassment and a hostile work environment In order to establish a prima facie case of sexual harassment, Plaintiff must show that "1) she belongs to a protected class; 2) she was subjected to unwelcome sexual harassment; 3) the harassment was based on sex; 4) the harassment affected a term, condition or privilege of employment; and 5) the employer knew or should have known of the harassment and failed to take remedial action. *Septimus, 399 F. 3d at 611.*

To make a claim for a hostile work environment under Title VII, the alleged harassment must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Ramsey v. Henderson,* 286 F. 3d 264, 268 (5th Cir. 2002). Plaintiff must subjectively perceive the harassment as sufficiently severe or pervasive, and this subjective perception must be objectively reasonable. *Harris v. Forklift Sys., Inc.*, 510 U. S. 17 (1993).

The Plaintiff describes her working relationship with Gibson:

I was belittled, degraded, demeaned, ridiculed, and subjected to disparaging remarks. I was threatened with low

appraisals, shouted at and humiliated, especially in front of other employees. I was taunted and teased with the intention to embarrass and humiliate me. Mr. Gibson deliberately set unrealistic goals and deadlines for me, which were unachievable, and which were changed without notice or reason, or whenever it appeared to him that I was close to achieving them. Other employees were not required to achieve such high standards.

(Doc. No. 22, at 4) To support her claim, Plaintiff claims that Gibson unfairly took her phone card and her printer after she was removed from the Flexi-place program. (Doc. No. 8, Ex. 38, at 113: 20-21). Later, she alleges that he made an insulting comment to her regarding her level of work experience, and that she once saw him gossiping about her with other employees. (Doc. No 8. Ex. 38, at 102: 1-5). Finally, Plaintiff claims Sue Burton, her OJI, treated her poorly. (Doc. No 8, Ex. 38, at 118: 17-20).

Assuming that these allegations are all true, the Plaintiff's perception that they amount to sexual harassment or a hostile work environment is not objectively reasonable. Losing one's computer, or receiving criticism from a superior, is certainly an unpleasant experience for an

employee, but is not the type of action that Title VII was intended to prohibit. As to Plaintiff's allegations that Mr. Gibson insulted her on a few occasions, these isolated events do not reach the level of 'harassment" envisioned by Title VII. "Simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount in discriminatory changes in the "terms and conditions of unemployment." *Clark County School District v. Breeden,* 532 U. S. 268, 271 (2001) (*quoting Faragher v. Boca Ratgon,* 524 U. S. 775, 788 (1998)).

In *Septimus,* the plaintiff alleged that she ws subject to a two hour :harangue in her office by her male manager which "frightened her and made her feel useless and incompetent." 399 F. 3d at 612. Her manager also questioned her about a presentation in a "mocking tone" and told her that she was "like a needy old girlfriend." *Id.* The Fifth Circuit found this behavior, which is arguably more offensive than that alleged here, was not :harassment" with the context of Title VII. Plaintiff unquestionably experienced great unhappiness at her office; this is not sufficient. However, to establish a prima facie case of sexual harassment and a hostile work environment..

D. Retaliation

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Plaintiff also alleges that she suffered retaliation based on her EEO complaints against Gibson and Arnold. A plaintiff may establish a prima facie case of unlawful retaliation by demonstrating; "1)[she] engaged in protected activity, 2) [she] suffered and adverse employment decision, and 3) a casusal link exists between the protected activity and the adverse employment decision," *Medina v. Ramsey Steel Co., Inc.*, 238 F. 3d 674, 684, (5th Cir. 2001). To establish a causal link, an employee "should demonstrate that the employer knew about the employee's protected activity." *Manning v. Chevron Chem. Co.*, 332 F. 3d 874, 883 (5th Cir 2003). If a plaintiff makes a prima facie case, the burden shifts to the defendant to offer a legitimate reason for the employment decision. If the defendant makes such a showing, the burden shifts back to the plaintiff to show that the articulated reason was a pretext for retaliation. To demonstrate pretext, a plaintiff must show that the adverse employment action would not have occurred but for his protected conduct. *See Septimus*, 399 F. 3d at 608.

The parties agree that plaintiff engaged in protected activity and that she suffered an adverse decision. The issue is

whether there was a "causal link" between her protected activity and the adverse employment decision. The issue is whether there was a "causal link" between her protected activity and the adverse employment action. The "causal link" required in prong three of the prima facie case for retaliation is not as stringent as the "but for" standard." *Evans v. City of Houston,* 246 F. 3d 344, 354 (5th Cir 2001) (citing *Long v. Eastfield College,* 88 F. 3d 300, 305 (5th Cir 1996)). Determining the causal link is "highly fact specific," and the court can look at the employee's past disciplinary record, whether the employer followed typically policy and procedure in terminating the employee, and the temporal relationship between the employee's conduct and discharge. *See Nowlin v. Resolution Trust Corp.*, 33 F. 3d 498, 508 (5th Cir 1994).

Plaintiff offers no evidence, other than her own assertions, linking her activity and the adverse employment action. We therefore assume that her case is based on the temporal connection between the protected activity and the adverse employment action. The Fifth Circuit has held that a five-month lapse between the protected activity and the alleged retaliatory

act, without more, cannot establish a causal link. *Raggs v. Mississippi Power & Light Co.*, 278 F. 3d 463, 471-72 (5th Cir. 2002).

Plaintiff engaged in "protected activity" by filing EEO complaints in July 2004 and again in September 2004. Defendant argues that, since Plaintiff was not terminated until August 25, 2005, there is no temporal connection between her protected activity and the adverse employment action.[2] This argument overlooks the fact that the Opportunity Letter was issued on August 31, 2004, just over a month after the Plaintiff's first EEO complaint. Issuing an Opportunity Letter to the Plaintiff, which effectively put her on probation and thus changed the terms of her employment, could be considered an adverse employment action itself. *See Evans,* 246 F. 3d at 353 , (*quoting Burlington Indus., Inc., v. Ellerth,* 524 U. S. 742, 761 (1998)). If so, the temporal proximity of those two events becomes much more probative.

[2] Defendants also assert that Ms. Dolby, the deciding official, was not aware of the plaintiff's protected activity. This fact is not highly prohibitive given that Ms. Dolby was simply reviewing the decision of Mr. Arnold, who was the subject of the Plaintiff's EEO activity.

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We do not have to reach the issue of temporal proximity, however, because Plaintiff's poor performance record is determinative. Before she filed her first EEO complaint, she had already received three failing evaluations from Gibson. Filing an EEO complaint does not allow an employee to escape her own poor performance record. *See Raggs*, 278 F. 3d at 471. Title VII does not prevent employers from completing adverse employment actions that are in progress when the EEO complaint is filed. *Clark*, 532 U. S. at 275. Plaintiff has mot met the burden of establishing a prima facie case of discrimination.

III.
PLAINTIFF'S NON-DISCRIMINATION CLAIMS

A. Standard of Review for Non-Discrimination Claims.

In reviewing the Plaintiff's non-discrimination claims, we are limited to the MSPB's record. This Court may set aside the MSPB's decision only if it is: (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2)

obtained without procedures required by law, rule or regulation having been followed; or (3) unsupported by substantial evidence. 5 U. S. C. § 706; *Girling Health Care, Inc. v. Shalala,* 85 F. 3d 211, 214 (5th Cir. 1996). Substantial evidence is defined as "more than a scintilla; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Girling,* 85 F. 3d 211 at 215, (*quoting Richardson v. Perales,* 402 U. S. 389, 401 (1971)). Where the Court's review is confined to the administrative record, "[j]udicial review has the function of determining whether the administrative action is consistent with the law-that and not more." *Girling,* 85 F. 3d 211 at 215.

B. THE MSPB's Decision Regarding Plaintiff's Termination Is Supported By Substantial Evidence.

The MSPB had before it, as the Court now has, a voluminous record describing the Plaintiff's employment history.[3] As has been previously discussed, Plaintiff was warned about the quality of her work, and the possibility of termination, as early as November 2003. She received numerous negative performance reviews following this initial warning, and she admitted herself that she had received failing performance

reviews at various times throughout her career.

In addition to Plaintiff's employment record, the MSPB had the benefit of hearing testimony from not only Plaintiff and Gibson, but also Sue Burton, the Plaintiff's OJI. The MSPB found her testimony credible: she testified regarding the Plaintiff's low level of competence and her refusal to receive assistance. (Doc. No. 8, Ex. 10.) The only evidence Plaintiff presented to contradict her record and Ms. Burton's testimony was her own regarding her abilities as a revenue officer. *Id.*

[3] **Plaintiff argues that the MSPB record that was delivered to this Court is not complete because there are gaps in the hearing tapes. The Court has reviewed the hearing tapes and found them to be complete. [4] Plaintiff contends that the MSPB's decision is not in compliance with the law because the MSPB did not review the agency's performance standards. This argument has no merit. The MSPB, in its initial decision, began its discussion by reviewing the agency's standards and noting that they had been approved by Office of Personnel Management in 1986. (Doc. No. 8, Ex. 10.) The MSPB goes on to say that not only were these standards approved, but they were made available to the Plaintiff on several occasions.** *Id.*

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We must give great deference to the MSPB's review of the facts. *Girling*, 85 F. 3d 211, at 215. The MSPB's decision affirming Plaintiff's termination is in accordance with the law[4] and supported by substantial evidence.

C. The MSPB's Decision Regarding Plaintiff's Whistleblower Claim is Supported by Substantial Evidence.

Plaintiff also claims that her termination was reprisal resulting from her actions protected under the Whistleblower Protection Act ("WPA"). 5 U. S. C. § 2302(b)(8). Under the WPA, employers cannot take personnel actions as a result of any disclosure by an employee that the employee reasonably believes evidences a violation of law, rule or regulation, or evidences gross mismanagement, a gross waste of funds, and abuse of authority, or a substantial and specific danger to public health or safety. *Watson v. Department of Justice*, 64 F. 3d 1524, 1527 (Fed. Cir. 1995). To establish a prima facie case under the WPA, a plaintiff must prove by a preponderance of evidence that: (1) she made a protected disclosure; (2) subsequent to the

disclosure she was subject to disciplinary action; and (3) the disclosure was a contributing factor to the personnel action taken against her. *Carr v. Social Security Admin.*, 185 F. 3d 1318, 1322 (Fed. Cir. 1999). A critical element of the prima facie case is evidence that the accused decision-making official knew of the plaintiff's disclosure. *See, e. g. Stanek v. Department of Transp.*, 805 F. 2d 1572, 1580 (Fed Cir. 1986).

Plaintiff alleges that she engaged in two protected actions protected by the WPA: first, her Congressional testimony in 1998, and second, her TIGTA claim regarding another revenue officer's abuse of travel vouchers. (Doc. No. 8, Ex. 10.) As to the Congressional testimony, Plaintiff admitted that she never actually testified before Congress and that she had never informed any of her current managers that she had planned to do so. *Id.* The MSPB found credible Gibson, Arnold, and Dolby's testimony confirming that they never knew Plaintiff planned to testify before Congress. This activity, therefore, is not casually connected to Plaintiff's termination.

As to the TIGTA claim, Plaintiff concedes that she never told her managers

that she reported her co-workers abuse of the travel vouchers.[5] *Id.* Once again, the MSPB found credible the managers' testimony that they did not know Plaintiff was the one who filed the TIGTA grievance. Plaintiff has failed to establish a prima facie case that she engaged in protected activity that was casually connected to her termination; her WPA claim is therefore denied.

[5] In reviewing the record, this Court did find one email in which the Plaintiff informed Gibson that she was meeting with TIGTA on August 3, 2004. (Doc. No 8, Ex. 34, v. 2 tab 4d 110.) Plaintiff did not tell Gibson what she intended to discus with TIGTA, however, so it is reasonable to conclude that this email did not put him on notice that Plaintiff made the complaint about the travel vouchers. Neither party discusses this email in their filings.

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V. CONCLUSION

Defendant's Motion for Summary Judgment on Discrimination Claims and Motion for Summary Judgment on Non-Discrimination Claims are **GRANTED.** Defendant moved to dismiss Plaintiff's claims for libel, slander, defamation, and intention infliction of emotional distress. (Doc. No. 10). Plaintiff withdrew these claims in her response. (Doc No. 23.) Defendant's Motion to Dismiss is therefore **DENIED AS MOOT.**

IT IS SO ORDERED.

SIGNED this 29th day of September, 2008.

s//_____
KEITH P. ELLISON
UNITED STATES
DISTRICT JUDGE